Duquesne Law Review

Volume 20 | Number 3 Article 8

1982

Constitutional Law - Fifth Amendment - Due Process - Equal Protection - Sex Discrimination

Michael B. Sedlock

CONSTITUTIONAL LAW—FIFTH AMENDMENT—DUE PROCESS—EQUAL PROTECTION—SEX DISCRIMINATION—The United States Supreme Court has held that enactment of a male-only draft registration requirement does not violate the equal protection component of the fifth amendment due process clause.

Rostker v. Goldberg, 453 U.S. 57 (1981).

On June 16, 1971, the plaintiffs, potential inductees,[1] filed suit in the United States District Court for the Eastern District of Pennsylvania seeking a declaratory judgment that the Military Selective Service Act (MSSA)[2] was unconstitutional.[3] Their request to convene a three-judge district court was denied, however, because the allegations of unconstitutionality did not reach the threshold requirements necessary to give a three-judge court subject-matter jurisdiction.[4] On appeal,[5] the district court's ruling was affirmed, except for the plaintiffs' claim that the MSSA unconstitutionally discriminated between males and females. On remand, the district court denied the defendant's motion to dismiss the complaint and convened a three-judge court to decide the issue of unlawful gender-based discrimination.[6]

---

1. The original plaintiffs were Lewis Rowland, David Freudberg, and David B. Sitman, Goldberg v. Tarr, 510 F. Supp. 292 (E.D. Pa. 1980). The original named defendant was Curtis Tarr, then Director of the Selective Service System.

2. 50 U.S.C. App. §§ 451-462 (1981). *See infra* note 9.

3. The plaintiffs' five-count complaint alleged: (1) a taking of property without due process, (2) involuntary servitude, (3) unconstitutional discrimination between the sexes, (4) infringement of the rights of free speech and peaceful assembly, and (5) the unconstitutionality of the Vietnam War.

4. Rowland v. Tarr, 341 F. Supp. 339 (E.D. Pa. 1972). Jurisdiction was asserted under 28 U.S.C. §§ 1331, 2201, & 2202 (1976); 42 U.S.C. §§ 1981, 1983 & 1985; and U.S CONST. amends. I, V, IX, X & XIII. The threshold requirement of a substantial Constitutional question, *see* 28 U.S.C. § 2282 (1980), was not met because the complaint alleged unconstitutionality of the draft in its entirety, and clearly it was within Congress's power to adopt the MSSA. 341 F. Supp. at 341.

5. Rowland v. Tarr, 480 F.2d 545 (3d Cir. 1973). Upon remand, the district court was to determine if the discrimination claim was substantial enough to warrant the convening of a three-judge district court and to determine whether plaintiffs had standing. 341 F. Supp. at 342.

6. Rowland v. Tarr, 378 F. Supp. 766 (E.D. Pa. 1974). Defendant asserted that the question was moot because the legislation permitting induction had

On March 19, 1975, President Ford ended draft registration[7] and the case lay dormant.[8] On July 2, 1980, President Carter signed a Proclamation that reinstated draft registration.[9] On July 1, 1980 the district court had certified a plaintiff class composed of all males who are required to register under the MSSA or are liable for training under the MSSA. The three-judge panel permanently enjoined male-only draft registration, finding that section 3 of the MSSA unconstitutionally discriminated between males and females because it was not substantially related to a government interest.[10]

On July 19, 1980, Justice Brennan, circuit justice for the Third Circuit, stayed the order enjoining commencement of the draft.[11] The United States Supreme Court noted probable jurisdiction,[12] and held that enactment of male-only draft registration was within the constitutional authority of Congress.[13]

Justice Rehnquist, speaking for the majority,[14] examined

---

lapsed. Presidential Proclamation No. 4360, 3A C.F.R. 33 (1975). This assertion was dismissed on July 1, 1974, because the three-judge district court reasoned that the plaintiffs were still under no obligation to register for the draft. 378 F. Supp. at 768.

7. Presidential Proclamation No. 4360, 3A C.F.R. 33 (1975).

8. On June 25, 1975, Robert L. Goldberg intervened as a party plaintiff, and on July 22, 1975, the motions of the original plaintiffs to be dismissed were granted. 510 F. Supp. at 292.

9. Presidential Proclamation No. 4771, 45 Fed. Reg. 45247 (1980). President Carter's action was prompted by the Soviet invasion of Afghanistan. 50 U.S.C. App. § 453 (1981) provides in pertinent part:

> [I]t shall be the duty of every male citizen in the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by the rules and regulations prescribed hereunder. . . .

Id.

10. The court relied on Craig v. Boren, 429 U.S. 190 (1975), applying a "middle tier" equal protection analysis. *See infra* text accompanying note 60. The court decided only the issue of draft registration and stressed that in order to avoid involvement in military affairs it was not deciding whether or to what extent women should serve in combat. (Goldberg v. Rostker, 509 F. Supp. 586, 597 (E.D. Pa. 1980).

11. Rostker v. Goldberg, 453 U.S. 57 (1980).

12. 453 U.S. 64 (1980).

13. 453 U.S. at 82.

14. Chief Justice Burger and Justices Stewart, Blackmun, Powell and Stevens joined the majority opinion. Justices White and Marshall filed separate dissenting opinions. Justice Brennan joined in both dissents.

whether the MSSA, by authorizing the President to require males, but not females, to register for the draft, violated the fifth amendment.[15] He observed that when the Court is called upon to judge the constitutionality of congressional actions, it is not exercising primary judgment but is judging the acts of a co-equal branch of government.[16] In accord with the Court's past practices, the majority noted that because this case involved Congress's authority over national defense and military affairs, the Court was obliged to give even greater deference to this enactment than the deference customarily afforded Congress.[17]

Justice Rehnquist observed that Congress had expressly relied on its constitutional power over military affairs[18] in declining to impose registration requirements on women.[19] He further noted that the Court lacked competence in the area of military affairs

---

15. 453 U.S. at 64. *See* U.S. CONST. amend. V: "[N]or be deprived of life, liberty, or property, without due process of law; . . ."

16. *Id. See also* Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (Frankfurter, J., concurring).

17. 453 U.S. at 64. The Court acknowledged that its recent decisions afforded deference to executive and congressional decisions in military affairs. *Id.* at 64-65. *See* Brown v. Glinis, 444 U.S. 348 (1980) (upholding regulations imposing a prior restraint on military personnel's right to petition); Middendorf v. Henry, 424 U.S. 25 (1976) (recognizing that the Court must defer to Congress's authority to regulate army and naval forces); Greer v. Spock, 424 U.S. 828 (1976) (upholding a ban on political speeches by civilians on a military base); Schlessinger v. Ballard, 419 U.S. 498 (1975) (holding in response to a due process challenge by males contesting the Navy's policy of allowing females a longer period than males in which to achieve promotions which are necessary to remain in the Navy, that men and women were not similarily situated); Packer v. Levy, 417 U.S. 733 (1974) (rejecting a vagueness and overbreadth challenge to army regulations by reasoning that greater flexibility is allowed Congress when it is regulating members of the military).

18. U.S. CONST. art. I, § 8, cl. 12: "The Congress shall have Power . . . [t]o raise and support Armies, but no Appropriation of Money to that use shall be for a longer term than two years"; U.S. CONST. art. I, § 8, cl. 13: "To provide and maintain a Navy"; U.S. CONST. art. I, § 8, cl. 14: "To make Rules for the Government and Regulation of the land and naval Forces."

19. 453 U.S. at 65. The Report of the Senate Armed Services Committee stated:

> Article 1 Sec. 8 of the Constitution commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for Government and regulation of the land and naval forces, and pursuant to these powers it lies within the discretion of the congress to determine the occasions for expansion of our Armed Forces, and the means best suited to such expansion should it prove necessary.

S. REP. NO. 826, 96th Cong., 2d Sess. 159-161 (1980); 126 CONG. REC. S6531-S6533; 1980 U.S. CONG. & AD. NEWS 2650.

and decisions.[20] Justice Rehnquist stated that while Congress remains subject to the due process clause, the tests and limitations applied in the area of military affairs may be different. In resolving the issue before it, the Court acknowledged that it must avoid substituting its considered opinion or appraisal of the evidence for that of the legislative branch.[21]

Justice Rehnquist rejected the plaintiffs' argument that registration involves civilians, not military personnel,[22] and found that registration is the first step in the military induction process. Observing that congressional decisions concerning draft registration involve judgments on military operations and needs, he asserted that the same deference afforded congressional judgments in these areas should be applied to congressional decisions concerning draft registration and induction.[23] The majority rejected the government's argument that because this case involved military affairs, in which Congress is accorded greater deference, the Court should abandon the heightened scrutiny test that has been applied in other gender-based discrimination cases[24] and apply a test that would allow distinctions to be drawn which bear a rational relationship to some legitimate government purpose. Justice Rehnquist admonished that formulating the degrees of deference to congressional judgments as well as designated

20. 453 U.S. 66. The Court cited Gilligan v. Morgan, 413 U.S. 1 (1973). In *Gilligan*, the Court held that there was no justiciable controversy where former students of Kent State sought injunctive relief to prospectively restrain the Governor from prematurely summoning the National Guard as they believed was done in May of 1968 when four students were killed by guardsmen. The Court recognized its lack of competence, but made it clear that it was not saying that the conduct of the National Guard was beyond judicial review. *Id.* at 5.

21. 453 U.S. at 67-68.

22. *See* Brief for Appellees at 19. The district court reasoned that because this case did not concern day-to-day military operations, the court was not intruding into military and national defense affairs. 509 F. Supp. at 596. The Supreme Court found the reasoning unpersuasive. 453 U.S. at 68.

23. 453 U.S. at 68.

24. *See* Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981). The Court in *Michael M.* applied a heightened scrutiny evaluation to test whether a California statutory rape law discriminated against males under the age of 18. Justice Rehnquist, speaking for the Court in a plurality opinion, upheld the law, which made it criminal to have sexual intercourse with a female under 18 years of age, not the wife of the perpetrator. He held that subjecting only men to ciminal responsibility was sufficiently related to the State's objectives and therefore, the classification was not unconstitutional. *Id.* at 476. *See also* Orr v. Orr, 440 U.S. 268 (1968) (declaring unconstitutional an Alabama alimony law that allowed only payments to women).

categories of scrutiny can result in mechanical categorizations used simply to justify a result.[25]

Applying the test announced in *Craig v. Boren*,[26] the Court found it undeniable that the government has an important interest in raising armies. Justice Rehnquist observed that when the Court evaluates a congressional action in this area, it cannot decide how it would act, but only whether the method chosen by Congress denies equal protection.[27] Justice Rehnquist observed that the Court had not adopted a different equal protection test in the military context,[28] and acknowledged Congress's broad constitutional authority to choose among well considered alternatives when raising and supporting an army.

The Court distinguished this case from several previous gender-based discrimination cases because of the time and means Congress had expended in considering other alternatives.[29] Justice Rehnquist noted that after considering the alternatives, both houses of Congress declined to allocate enough funds to the Selective Service System to provide for the registration of women.[30] The Court therefore concluded that the decision to ex-

---

25. 453 U.S. at 69-70.

26. 429 U.S. 190 (1976). *See infra* notes 86-96 and accompanying text.

27. There is no equal protection clause applicable to the federal government; however, the due process clause of the fifth amendment has been interpreted to include an equal protection component. Schlesinger v. Gallard, 419 U.S. 498, 500 n.3. (1975).

28. 453 U.S. at 70-71. Justice Rehnquist relied on Schlesinger v. Ballard, 419 U.S. 498 (1975). In *Schlesinger*, the Court held that a military context did not warrant a different equal protection test. 419 U.S. at 507.

29. 453 U.S. at 72. *See* Sen. Hearings on S. 2294; *Hearings on National Service Legislation before the Subcommittee on Military Personnel of the House Comm. on Armed Services*, 96th Cong., 2d Sess. (1980). The proposition of registering women received not only national attention, but was also extensively considered by both Houses of Congress where the question of registering women for the draft was discussed. *See Hearings on National Service Legislation before the Subcommittee on Military Personnel of the House Committee on Armed Services*, 96th Congress, 2d Session (1980); *See also* House of Representatives, Joint Resolution 521; 126 CONG. REC. S6546 (Sen. Nunn) (June 10, 1980).

30. 453 U.S. at 72-73. *See* House Subcommittee on Military Personnel of the House Armed Services Comm., 96th Cong., 2d Sess. (1980), and the Senate Armed Services Comm., S. REP. NO. 960226, 96th Cong., 1st Sess. 8-9 (1979) and S. REP. NO. 96-826, 96th Cong. 1st Sess. (1979). While funds were being allocated for the registration of males only, congressional committees held hearing on the issue of registering women and ultimately rejected the proposal. 453 U.S. at 73. In doing so, both houses adopted the findings of Senate Report No. 826.

empt women was not attributable to traditional stereotypes placed upon women.[31]

Based upon an evaluation of the legislative history surrounding congressional actions in 1980, the majority concluded that the purpose of draft registration was to prepare for the draft by providing a pool of potential inductees.[32] Observing that women as a group are not eligible for combat,[33] Justice Rehnquist determined that Congress decided to exclude women from draft registration because if they were not eligible for combat there was no need to register them.[34] He rejected the district court's assertion that women were excluded because needs could be filled by men alone, and held that men and women are not similarly situated for purposes of draft registration because of the combat restrictions on women.[35] Justice Rehnquist concluded that the exemption of women was closely related to the purpose of registration and therefore did not contravene the due process clause.[36]

The Court observed that Congress could focus on military need rather than equity in regulating armies and navies.[37]

---

31. 453 U.S. at 74. *See* Califano v. Webster, 430 U.S. 313 (1976) (Court relied on a House Report to determine that favorable treatment to female over male wage earners was not based upon the traditional way of thinking about women).

32. 453 U.S. at 76. The Court noted that the stated purpose of the MSSA was to provide for national security by ensuring a speedy and efficient method of induction in case of an emergency. Also, because only those who register may be drafted, it follows then that the purpose of registration is to provide a pool for the draft. Finally, should a national emergency arise, a need for combat troops would be the warranting factor for the draft. The Court cited Senate Report No. 826.

33. 453 U.S. at 76. By statute, women in the Navy and the Air Force are prohibited from participating in combat. Along with the Marine Corps, the Army has an established policy against using women in combat. *See* 10 U.S.C. §§ 6015 & 8549 (1976) and Presidential Recommendations for Selective Service Reform - A Report to Congress. Prepared pursuant to Pub. L. 96-107 (Feb. 11, 1980).

34. 453 U.S. at 77. In part, the Senate Report read: "The policy precluding the use of women in combat is, in the Committee's view, the most important reason for not including women in a registration system." S. REP. NO. 826, *supra* n.33, at 157, *reprinted in* U.S. CODE CONG. AD. NEWS 1980, 2647.

35. 453 U.S. at 78. *See* 509 F. Supp. at 598.

36. 453 U.S. at 78-79. The Court stated: "The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality." *Id.* at 79.

37. *Id.* at 79-80. Director of the Selective Service System, Bernard Rostker, stated at the House Hearings that "the President's decision to ask for authority to register women is based on equity." *Hearings on National Service Legisla-*

Justice Rehnquist noted that the district court had relied on testimony that 80,000 women could be used to fill noncombat positions if a draft became necessary.[38] The Court maintained that in so reasoning, the district court exceeded its authority by ignoring the congressional response to this rationale.[39] The Court found that Congress adequately considered the possibility of drafting 80,000 women conscripts and that the rejection of this proposal was within its constitutional authority.[40] The Court, in reversing the district court's holding, held that when Congress authorized the registration of men under the MSSA and excluded women, it acted within its constitutional authority.[41]

Writing in dissent,[42] Justice White pointed out that if the exclusion of women from combat is constitutional and all positions in time of war must be filled with combat-ready troops, there is no reason to have women in the army at all.[43] He disagreed with the Court's apparent determination that Congress had concluded that women could not be used in non-combat positions in times of military need.[44] Justice White also disagreed with a majority finding that Congress had concluded the number of women in wartime that could serve in positions that would not affect military flexibility could be met through volunteers.[45] He sug-

---

tion Before the Subcommittee on Military Personnel of the House Committee on Armed Services, 96th Cong. 2d Sess (1980). The Senate Report reached the conclusion that the support for registering women was based on principles of equity rather than military need.

38. 453 U.S. at 81. Congress found that in the event of a draft, 650,000 individuals would need to be inducted in the first 6 months. *See id.* at 106 n.19 (Marshall, J., dissenting).

39. *Id.* at 81. The court asserted that Congress had concluded that even if a small number of women could be recruited for combat positions, it still would not be worth the added burden of drafting and training them and that the need for non-combat personal could be met by volunteers. *See supra* note 30 and accompanying text. The Court also noted that Congress had determined that the use of women in non-combat positions would hamper military flexibility. The Senate Report gave two reasons for this determination: (1) Non-combat troops must be able to move into action if necessary, and (2) rotation of personnel is essential. *See supra* note 30.

40. 453 U.S. at 82.

41. *Id.* at 83.

42. Justice Brennan joined in this dissent.

43. 453 U.S. at 83 (White, J., dissenting).

44. *Id. See id.* at 76-77.

45. *Id.* at 83-84 (White, J., dissenting). Congress found that 80,000 women could be used in the event of a need to conduct a draft. *See supra* note 30 & accompanying text.

gested that the record was subject to different interpretations and that the case should be remanded to determine whether Congress adequately considered the possibility of filling 80,000 non-combat positions with women.[46] Justice White stressed that administrative convenience was not sufficient justification for gener-based discrimination and stated that he found no justification for such discrimination here.[47]

Justice Marshall, also writing in dissent,[48] asserted that the only issue presented was whether the exclusion of women from registration violated the equal protection guarantees inherent in the fifth amendment.[49] Justice Marshall asserted that the MSSA must be held unconstitutional unless the government can prove, under the test announced in *Craig v. Boren*, that the distinction between the sexes is substantially related to the achievement of an important government purpose. He noted that this test is applied regardless of whether the challenged classification discriminates against males or females.[50] He stated that although Congress must be afforded great deference in military decisions, the Court cannot allow this practice to prevent it from deciding constitutional issues.[51] Justice Marshall maintained that the Court, in finding that Congress's actions were substantially related to important government interests of effective defense, inappropriately used the deference element in the equal protection analysis.[52]

---

46. 453 U.S. at 85 (White, J., dissenting).

47. *Id.* at 85-86 (White, J., dissenting).

48. *Id.* at 86 (Marshall, J., dissenting). Justice Brennan joined in this dissent also.

49. *Id.* Justice Rehnquist framed the issue in the same manner. Justice Marshall explained that male only registration violated women's right to equal protection by denying them an opportunity to perform a civic obligation.

50. *Id.* at 87. (Marshall, J., dissenting). This is known as the "heightened" scrutiny test. Justice Marshall agreed with the majority that there is no doubt that the government has an important interest in national security areas and that the real question was whether the exemption of women from draft registration was substantially related to that interest.

51. *Id.* at 89 (Marshall, J., dissenting). "Even the war power does not remove constitutional limitations safeguarding essential liberties." United States v. Robel, 389 U.S. 958, 263-64 (1967) (quoting Home Building & Loan Association v. Blairsdell, 290 U.S. 398, 426 (1934)).

52. 453 U.S. at 90 (Marshall, J., dissenting). Justice Marshall noted that Congress recognized the important contributions made by women in the military and had approved efforts to expand women's roles. U. S. CODE CONG. & ADMIN. NEWS (1980), p. 2647.

He observed that the government did not justify the preclusion of women from draft registration because precluding women from serving in the armed services is substantially related to the effectiveness of the military. Justice Marshall concluded that the justification for the gender-based classification must therefore be based on considerations peculiar to the objectives of registration.[53] He then stated that although the majority had purported to apply the *Craig v. Boren* test, it had instead employed the different "similarly situated" test. In order for the government to sustain its gender-based classification, Justice Marshall maintained, the classification must do more than substantially advance important governmental interests: rather, the classification itself must be substantially related to the achievement of the asserted government interest.[54] Justice Marshall observed that the government failed to do this because it made no claim that its interest cannot be accomplished by registering both sexes and drafting only males if necessary.[55] Moreover, he pointed out that although the majority's decision was based upon the assumption that conscription would occur in the event of a need for military mobilization, there is no guarantee that a peace time draft will not be held.[56]

Justice Marshall also opined that the majority erred in basing its analysis upon conscription rather than registration.[57] This

---

53. 453 U.S. at 90-92 (Marshall, J., dissenting). He stated that even if the government has an important interest in excluding women from combat, there is no reason for the majority to believe that exempting them from draft registration is substantially related to the interest. *Id.* Justice Marshall pointed to the Senate Report, *see supra* note 30, which stated that the major purpose for excluding women from registration was the policy against using women in combat.

54. 453 U.S. at 94 (Marshall, J., dissenting). Justice Marshall believed, *see infra* note 96 and accompanying text, that under the *Craig v. Boren* test the Government must show that registering women would substantially impair its efforts to prepare for a draft. 453 U.S. at 94 (Marshall, J., dissenting).

55. 453 U.S. at 96 (Marshall, J., dissenting).

56. *Id.*

57. *Id.* Marshall stated, "This difficulty comes about because both Congress and the Court have lost sight of the important distinction between registration and conscription. Registration provides 'an inventory of what the available strength is within the military qualified pool in this country.'" *Reinstitution of Procedures for Registration Under the Military Selective Service Act: Hearing before the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee*, 96th Cong., 1st Sess., 10 (1980) (Selective Service Hearings) (statement of General Rogers). Conscription supplies the military with the

dissenter also proposed that the premise that every draftee must be available for combat duty is clearly false and unsupported by the record.[58] He then considered the majority's discussion of "equity" versus "military need".[59] Justice Marshall concluded that the House Hearings showed not only that equity favors registration, but that drafting women was consistent with military effectiveness.[60] Because both male and female conscripts could perform equally in certain positions, Justice Marshall concluded that whether Congress could subordinate the equal protection requirement that similarly situated persons be treated similarly depended on what was meant by "military need". He maintained that the absence of "military need", in the sense that a war could be successfully fought without conscripting women, was constitutionally irrelevant.[61] Justice Marshall further asserted that because the purpose of registration is to provide a pool of inductees in the event needs cannot be met otherwise, the current supply of female volunteers could not be used to justify excluding women from registration.[62]

Acknowledging that military flexibility is indeed an important government interest, this dissenter maintained that although the Senate Report stated that a large number of women inductees would interfere with flexibility, there was nothing in the record to support a conclusion that a limited number of women would

---

personnel needed to respond to a particular exigency. Justice Marshall stated the fact that registration law expressly discriminating between men and women may be justified by a valid conscription program which would, in retrospect, make the current discrimination appear functionally related to the program that emerged. 453 U.S. at 96 (Marshall, J., dissenting).

58. 453 U.S. at 97 (Marshall, J., dissenting). Justice Marshall pointed out that the record established that women could fill many non-combat positions in the event of mobilization. *Id.* at 98-101 (Marshall, J., dissenting).

59. *Id.* at 102-03 (Marshall, J., dissenting). The majority held that Congress acted within its constitutional powers by considering military need rather than equity. *See supra* note 37 and accompanying text.

60. 453 U.S. at 102 (Marshall, J., dissenting). *See supra* note 30. Justice Marshall quoted Assistant Secretary Pierce: "Since women have proven that they can serve successfully as volunteers in the Armed Forces, equity suggests that they be liable to serve as draftees if conscription is reinstated." 453 U.S. at 102 (Marshall, J., dissenting). Justice Marshall explained that equity here is synonomous with the guarantee of equal protection.

61. 453 U.S. at 102 (Marshall, J., dissenting). Justice Marshall stated that it is not the plaintiff's burden to prove that women would be necessary in the event of mobilization. *Id.*.

62. *Id.*

impair flexibility.[63] In reviewing the record, Justice Marshall concluded that even with the deference due Congress in military affairs, the Court improperly held that the government met its burden of proving that its decision to exclude a limited number of women from the draft was substantially related to an important government interest.[64] He concluded that by doing so, the Court unjustifiably relied on the deference due Congress to avoid its duty of enforcing the Constitution and instead accomodated an act of Congress.[65]

In *Rostker v. Goldberg* the Supreme Court for the first time was faced with the issue of whether the MSSA[66] unconstitutionally discriminated against males by excluding women from draft registration.[67] In resolving the constitutional issue the Court applied the gender-based discrimination test established in *Craig v. Boren* while paying deference to legislative decisionmaking.[68] While both the majority opinion and Justice Marshall's

---

63. *Id.* at 106-11 (Marshall, J., dissenting). Justice Marshall provided quotes from the Senate Report which in his opinion provided evidence that in concluding that 80,000 women could be used in the event of mobilization, the Defense Department took into account military flexibility. He also believed that if drafting women would impair flexibility, then the increasing amount of women volunteers also impedes flexibility, yet Congress has passed legislation allowing for more females in the Armed Services. *Id.* at 453 n.7 (Marshall, J., dissenting). He also interpreted the Senate Report as saying that military flexibility would be impaired only if the draft were conducted randomly from a pool of both sexes. The Senate Report did not cover the possibility of a limited draft because the MSSA does not provide for separate drafts from each sexual category.

64. *Id.* at 112 (Marshall, J., dissenting). According to Justice Marshall, the Senate Report only establishes that drafting a large number of women would impair military flexibility.

65. *Id.* at 113 (Marshall, J., dissenting).

66. The MSSA has been attacked on other grounds: United States v. Dray, 427 F.2d 636 (1st Cir. 1970) (selective service found not to interfere with the right to life); United States v. Craft, 423 F.2d 829 (9th Cir. 1970) (registration found not to interfere with the free exercise of religion); United States v. Doris, 319 F. Supp. 1306 (W.D. Pa. 1970) (found not to be unconstitutionally discriminatory to males who are between 18½ and 26 years of age).

67. Plaintiffs' specific assertion was that because the exclusion of women made the pool of draftees smaller in number, each individual who must register for the draft had a better chance of being drafted.

68. *See* Roberts, *Gender-Based Draft Registration, Congressional Policy and Equal Protection: A Proposal for Deferential Middle-Tier Review*, 36 WAYNE L. REV. 35 (1980). Professor Roberts, writing before the Supreme Court rendered its decision, suggested that the Court should apply a deferential middle-tier when deciding *Rostker v. Goldberg*.

dissenting opinion agreed that this was the correct test, the opinions disagreed on the interpretation of the record before the Court. Consequently, both opinions applied the same test and reached different results.[69]

As the Supreme Court has recognized, deference must be afforded to congressional decisions in all areas.[70] The Court has traditionally decided to afford great weight to congressional decisions concerning military affairs and national defense because of its admitted lack of competence in decision-making in this area. In *United States v. O'Brien*[71] a defendant was convicted for burning his draft card.[72] Rejecting the defendant's claim that the law prohibiting mutilation of draft cards unconstitutionally abriged the constitutional right to freedom of speech,[73] the Supreme Court recognized Congress's broad powers in the area of military affairs.[74] In *Gilligan v. Morgan*[75] the Court recognized that the conduct of the National Guard is subject to judicial review, but criticized the court of appeals for failing to give due deference to congressional decisions in this area.[76] Although stated in dicta, this laid the foundation for the approach in examining congressional enactments in the area of military affairs.

Finally, in *Schlesinger v. Ballard*,[77] a male naval officer was subject to mandatory discharge because he failed, for a second

---

69. *See supra* notes 26, 36, 50 & 55 and accompanying text.

70. *See* C.B.S. v. Democratic Nat'l Comm. 412 U.S. 94 (1974). In *CBS* the Court held that it was not unconstitutional for CBS to refuse to sell time to persons wishing to speak out against Vietnam War. In doing so, the Court deferred to the congressional decisions in communications areas.

71. 391 U.S. 367 (1968).

72. Defendant was charged with violation of 50 U.S.C. App. § 462(b) (1976) which reads: "Any person . . . who forges, alters, knowingly mutilates or in any manner changes any such certificate (draft card) or any notation duly and validly inscribed thereon . . . shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years or both." *Id.*

73. 391 U.S. at 376. The defendant asserted that the statute was aimed at public displays, and thus, contravened first amendment rights.

74. *Id.* at 377. "The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." (Citations omitted). The Court continued, "The power of Congress to classify and conscript manpower for military service is 'beyond question.'" (Citations omitted). *Id.*

75. 413 U.S. 1 (1973).

76. *Id.* at 10-11.

77. 419 U.S. 498 (1975).

time, to be promoted to lieutenant commander.[78] He asserted that the mandatory discharge statute unconstitutionally discriminated between males and females because females were given an additional four years for which to attain the promotion.[79] In analyzing the issue, the Court looked to the legislative history to determine the purpose behind Congress's decision to enact the law. The Court then acknowledged Congress's broad constitutional powers in military affairs and upheld the statute after analyzing it with the increased amount of deference due in this area.[80]

In equal protection analyses the Court has traditionally applied two standards of review. A "strict scrutiny test" is applied where the legislature has adopted a statute that either on its face or through its administration has discriminated against a suspect class. In these types of cases the distinction between classes of people can only be upheld if the Court determines that such a distinction is necessary to promote a compelling state interest.[81] Second, the Court has applied the "traditional" test where it cannot find a suspect class that has been discriminated against. The Court will uphold the legislation as long as it bears a rational relation to some legitimate government interest.[82]

The Supreme Court has encountered difficulty in determining

---

78. *Id.* 10 U.S.C. § 6382 (1976) provides:

(a) Each officer on the active list of the Navy serving in the grade of lieutenant, except an officer in the Nurse Corps, and each officer on the active list on the Marine Corps serving in the grade of Captain shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander of major for the second time. However, if he so requests, he may be honorable discharged at any time during the fiscal year. . . . (d) "This section does not apply to women officers appointed under section 5590 of this title or to officers designated for limited duty.

Id.

79. 419 U.S. at 500.

80. *Id.* at 503-505. The Court found that because women had listed opportunities in certain activities such as combat or sea duty, they could not compile the same service records as males. Thus, in order to provide equal opportunity for promotion, Congress allowed women a longer time to attain credentials that will entitle them to be selected for promotion.

81. *See* Stanton v. Stanton, 421 U.S. 7 (1975).

82. *See* New Orleans v. Dukes, 427 U.S. 297 (1976). The Court in a per curiam opinion upheld a local ordinance that banned operation of pushcarts in the French Quarter of New Orleans, except for those who had done so continuously for eight or more years.

which approach to take in deciding cases involving sex discrimination[83] due to uncertainty over whether females were a suspect class.[84] Until 1971, the Court utilized the traditional test in analyzing equal protection claims based upon sex discrimination because it did not consider women a suspect class.[85] Then, the so-called "middle-tier"[86] test evolved when the Court determined that distinctions based on sex are not inherently suspect, but necessitate a higher standard of review than that afforded by the traditional test.[87]

The roots of this middle-tier analysis were laid in *Reed v. Reed*,[88] where an intestate's mother challenged an Idaho statute which provided that in the case of relatives in equal relationship to the deceased, preference will be given to males for appointment as administrator of the deceased's estate.[89] The plaintiff claimed that the statute contravened the equal protection clause of the fourteenth amendment because it discriminated on the basis of sex.[90] In declaring the statute unconstitutional, the *Reed* Court recognized that legislatively imposed sex classifications are subject to scrutiny by the courts,[91] and determined that in gender-based discrimination cases it will determine if the classification is substantially related to the purpose of the legislation.

---

83. *See*, Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981); *supra* note 24.

84. Fronterio v. Richardson, 411 U.S. 677 (1973). Justice Brennan, author of the plurality opinion, deemed females a suspect class. A majority of the Court, however, has never embraced this view.

85. *See* Hoyt v. Flouder, 368 U.S. 57 (1961) (sustaining a law placing women on a jury list only if they make a special request); and Goesaut v. Cleary, 335 U.S. 464 (1948) (upholding a law denying a bartender's license to women).

86. For an examination of the evolution of "middle tier" review, *see* Roberts, *supra* note 68, at 51.

87. *See* Stanton v. Stanton, 421 U.S. 7 (1973). The gender-based classification must be rationally related to the achievement of a legitimate government objective.

88. 404 U.S. 71 (1971). *Reed* is the first case that held that discrimination on the basis of sex violates equal protection. *See also* Roberts, *supra* n.68, at 45.

89. IDAHO CODE §§ 15-312, 15-314 (1966).

90. 404 U.S. at 72.

91. *Id.* at 75. The court stated: "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 76. (Citations omitted). "The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of secs. 15-312 and 15-314." *Id.* at 76.

In *Schlesinger v. Ballard* the Court applied the *Reed* analysis in deciding that Congress could have enacted a gender-based retirement law in order to achieve its objective of giving women an equal opportunity to advance in the armed services.[92] Although *Reed* and *Schlesinger* laid the goundwork for sex-discrimination analyses, they did not articulate the test that was applied by the *Rostker* Court.

The standard of review in sex discrimination applied by the majority in *Rostker v. Goldberg* was established in *Craig v. Boren*.[93] The plaintiff in *Craig* challenged an Oklahoma law[94] that prohibited the sale of 3.2% beer to males under the age of 21 and females under the age of 18.[95] The *Craig* Court recognized the *Reed* line of cases and established that in sex-discrimination cases the classification must serve important government objectives.[96] The *Rostker* Court rejected the idea that it should apply a refined traditional test because of the deference due Congress, but rather chose to apply the middle-tier approach while recognizing the appropriate deference due Congress in its choice of alternatives.[97]

By adopting the middle-tier test in *Rostker*, the Court is reinforcing the ideal that this standard of review is applicable no matter which sex is asserting the constitutional claim.[98] The

92. *See supra* note 19 and *infra* 98-102 & accompanying text.

93. 421 U.S. 190 (1976).

94. OKLA. STAT., tit. 37, 241 & 245 (1972).

95. The plaintiff asked for declaratory and injunctive relief. The Court held that the case was moot as to *Craig* because he became 21 before disposition of the case. The Court held, however, that plaintiff Whitence, a seller of 3.2% beer, had standing to make an equal protection challenge.

96. Craig v. Boren, 429 U.S. 190, 197 (1975). The Court in *Craig* stated: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and be substantially related to the achievement of these objectives." *Id.* The *Craig* Court held that the statute in question served an important government interest by seeking to prevent drunken driving; however, the Court held that the classification failed to be substantially related to that interest. Thus, the Supreme Court held that because the State of Oklahoma's interest of promoting road safety, the statute was unconstitutional.

97. Professor Roberts suggests this approach in his article. *See* Roberts, *supra* note 68. The majority admonished that "announced degrees of 'deference' to legislative judgments, just as levels of 'scrutiny' which this Court announces that it applies to particular classifications made by legislative body, may all to readily become facile abstractions used to justify a result." 453 U.S. 69-70.

98. Justice Marshall expressly acknowledges this in his dissenting opinion, *see supra* text accompanying note 50.

Supreme Court, therefore, appears to view the sexes as being equal. This conclusion can be drawn by looking at other equal protection challenges to classifications based on race, where the minority, e.g. blacks,[99] are entitled to strict scrutiny in classifications that burden them, while the majority, whites,[100] have their racial-based equal protection claims analyzed under the traditional test. The theory behind the use of two standards is that the majority can protect itself by virtue of its power of the ballot box, while the minority groups need protection by the courts.[101] In order to afford this protection, the Court scrutinizes the actions of the representatives of the majority harsher when they burden members of a minority. Because the Court will apply the middle-tier standard of review in gender-based equal protection challenges, no matter who asserts the claim, it apparently views neither sex as needing additional protection when burdened.

In applying a deferential middle-tier review[102] to the equal protection challenge in *Rostker*, the Court reinforced its position in gender-based discrimination challenges. In adhering to the *Craig* test rather than adopting a new standard due to the military context, the Court demonstrated to the lower courts that it has

---

99. Loving v. Virginia, 338 U.S. 1 (1967). The Court struck down anti-miscegenation statute. While the statute punished both races equally, the Court held that the statute was subject to strict scrutiny because the purpose of the statute was to promote white Supremacy, and thus, the state was adopting a policy which burdened other races.

100. *See* United Jewish Orgs. v. Carey, 430 U.S. 144 (1977), where the Court upheld a plan which split a white majority voting district into two non-white majority districts even though the New York legislature made the apportionment on the basis of race. *But see* Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978). In *Bakke*, the Supreme Court was faced with a white male's constitutional challenge of an affirmative action program on equal protection grounds.

Justice Powell, in a plurality opinion, held that if a classification denies equal opportunities or benefits enjoyed by other because of race then the classification must be regarded as suspect. However, this holding may be limited to circumstances where the classification excludes race from benefits entirely rather than just giving a preference to the minority race. Justice Powell stated that an admissions program that did not impose quotas but considered race for diversity purposes would not be unconstitutional. Thus, the strict scrutiny test would not be applicable to uphold a diversity policy. On the other hand, one would doubt whether a policy by the state giving admission advantages to whites would not be subject to strict scrutiny.

101. *See supra* note 99 and accompanying text.

102. *See supra* note 97.

settled upon a standard of review in the equal protection challenges to gender-based discrimination. By doing so, the Court has provided guidance, predictability, and stability to lower courts in an area certain to be actively involved in future litigation.

Michael B. Sedlock